

THOMAS E. JENNINGS

IBLA 92-364

Decided January 21, 1997

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer TXNM 86036.

Affirmed.

1. Mineral Leasing Act for Acquired Lands: Lands Subject To--Oil and Gas Leases: Acquired Lands Leases

Acquired lands which lie within incorporated cities, towns, and villages are excepted from leasing by 43 CFR 3100.0-3(b)(ii).

2. Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Offers to Lease--Oil and Gas Leases: Stipulations

When the surface of acquired land is under the jurisdiction of the Department of Defense and that Department has authorized issuance of an oil and gas lease only if the lease was made subject to a "no surface occupancy" stipulation, BLM may properly reject an offer to lease when the offeror has indicated that any lease issued to him must be "drillable."

3. Mineral Leasing Act for Acquired Lands: Lands Subject To--Oil and Gas Leases: Acquired Lands Leases

When oil or gas is being drained from lands otherwise unavailable for leasing, there is implied authority in the agency having jurisdiction of those lands to grant authority to the BLM to lease the drained lands. When there is a showing that drainage is occurring and that reserves recoverable by a protective well on the lands subject to leasing under this provision are sufficient to pay a reasonable profit over and above the cost of drilling and operating the well, the surface management agency can authorize BLM to lease the lands.

APPEARANCES: Thomas E. Jennings, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Thomas E. Jennings has appealed a March 30, 1992, decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting acquired lands noncompetitive oil and gas lease offer TXNM 86036. Jennings had filed the offer on December 17, 1990, seeking to lease 1,814.58 acres in Harris County, Texas.

BLM asked the Army Corps of Engineers, Galveston District (Corps), for a land status report and advice regarding stipulations that should be attached to a lease. On September 18, 1991, the Corps notified BLM that a portion of the surface of the lands described in Jennings' offer had been conveyed to the City of Houston, and the balance remained a part of the Ellington Air National Guard Base (Base). The Corps also advised BLM that any lease of the Base lands should contain a "no surface occupancy" stipulation. Jennings was given a copy of the Corps' report and wrote a letter to BLM on December 6, 1991, indicating that any lease issued to him should be "drillable."

On January 23, 1992, BLM's New Mexico State Office asked the Tulsa District Manager whether a gas well, the #72 Exxon West Fee B well, located to the south of the Base, was draining the land subject to Jennings' offer.

In a February 24, 1992, response, the Tulsa District Office noted that the well, which was approximately 1,300 feet from the southeast corner of the Base, had produced 898,281 thousand cubic feet of gas through November 1991. The report went on to state, however, that the well was having "water problems," which began in 1990, because "the gas-water contact for this reservoir has, with production, moved updip towards the bore of the #72 Exxon West Fee /B/, the only well producing from this reservoir." It was the Tulsa District Office's opinion that the well might be near the end of its economic life, an offsetting well on the Base would be uneconomic or dry, and the well was not draining the tract at the time of the report.

In its decision, BLM noted that 1,604.268 acres of the land sought by Jennings were within the city limits of Houston, Texas, and unavailable for leasing. BLM rejected the offer to the extent that the lands were within the Houston city limits because acquired lands within incorporated cities, towns, and villages were excluded from leasing by 30 U.S.C. § 352 (1994) and 43 CFR 3100.0-3(b)(ii).

The surface of the remaining 210.312 acres described in the offer were under the jurisdiction of the Air National Guard and subject to a "no surface occupancy" stipulation imposed by the Department of Defense. However, Jennings had informed BLM that any lease issued to him was to be "drillable." BLM deemed this to be an anticipatory rejection of any lease BLM might offer with a no surface occupancy stipulation.

In his statement of reasons, Jennings asserts that BLM's decision was based on the February 24, 1992, report from the Tulsa District Office. Jennings challenges the findings and conclusions (summarized above) made

in that report. Jennings asserts that the well is less than 1,000 rather than 1,300 feet from the Base and denies that the well had water problems.

Jennings asserts that the only problem with the well was the price of natural gas, causing the well to be shut-in during much of 1991. Jennings characterizes the conclusions that an offsetting well on the Base might be uneconomic or dry and that the #72 Exxon Fee /B/ might be near the end of its economic life as "pure speculation" and "outrageous."

[1] Jennings has presented no arguments challenging the rejection of his lease offer for the 1,604.268 acres within the city limits of Houston, Texas, because they are part of an incorporated city and, therefore, not available for leasing. As noted previously, 43 CFR 3100.0-3(b)(ii) excepts from leasing acquired lands which lie within "incorporated cities, towns and villages."

[2] The surface of the land outside the city limits was under the jurisdiction of the Department of Defense which had authorized issuance of a lease only if the lease was made subject to a "no surface occupancy" stipulation. Jennings had informed BLM that any lease issued to him was to be "drillable" prior to BLM's rejection decision. BLM deemed this to be an anticipatory rejection of any lease BLM might offer with a no surface occupancy stipulation. On appeal, Jennings has given no indication that BLM's conclusion was incorrect in this respect. We conclude that BLM properly rejected the offer for these reasons. See Estate of D.A. Moore, 120 IBLA 271, 272 (1991).

Notwithstanding the above stated conclusions, there is an exception to the general rule that acquired lands within incorporated cities, towns, and villages are not available for leasing. As noted in Hawthorn Oil Co., 37 IBLA 91 (1978), an exception, premised on the analysis in 40 Op. Att'y Gen. 41 (1941), provides that "[s]hould drainage occur by reason of wells drilled on adjacent lands, agreements with the owners thereof may be entered into by BLM, pursuant to 43 CFR 3100.3." Hawthorn Oil Co., *supra* at 94. When the Hawthorn decision was issued, the regulation found at 43 CFR 3103.3-3 provided, in part, that "[p]rotective leases may cover public domain lands which have been withdrawn from oil and gas leasing or acquired lands not subject to leasing under the Acquired Lands Leasing Act." When this provision was amended in 1983, the following language was substituted for that above quoted:

Where oil or gas is being drained from lands otherwise unavailable for leasing, there is an implied authority in the agency having jurisdiction of those lands to grant authority to the Bureau of Land Management to lease such lands (see 43 U.S.C. 1457; Attorney General's Opinion of April 2, 1941 (Vol. 40 Op. Atty Gen. 41)).

Thus, if there is a showing that drainage was occurring and that reserves recoverable by a protective well on the lands subject to leasing under this provision are sufficient to pay a reasonable profit over and above the

cost of drilling and operating the well, the surface management agency can authorize BLM to lease the lands. See discussion of drainage in Atlantic Richfield (On Reconsideration), 110 IBLA 200 (1989).

The Secretary of the Interior retains the discretionary authority to refuse to issue a noncompetitive lease for a given tract of land. Udall v. Tallman, 380 U.S. 1 (1965); Bernard Silver, 116 IBLA 341 (1990). Notwithstanding the superficially favorable Government drainage report, we find that Jennings has not presented sufficient evidence that the decision was in error, or a breach of the Secretary's authority. Considering the amount and nature of the production, the relatively unfavorable structural position of the Federal tract, and the fact that the Exxon well has been producing since 1989, we do not find sufficient showing of the probability that a profitable well could be drilled in the area of drainage to overturn the BLM decision. Further, if a decision were made to lease the tract, the tract would be subject to competitive lease offers. See 43 CFR 3120.1-1.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge